

1 Q And that is in this case, FCTA v. Gulf  
2 Power case?

3 A Yes, it is.

4 Q And that was after you were retained as an  
5 expert; correct?

6 A Yes.

7 Q And the words that are written in this  
8 document are your words, are they not?

9 A Yes.

10 Q If you would, please, turn to the third  
11 page of Gulf Power Exhibit 73.

12 A Yes.

13 Q In the middle of the page, in all caps, it  
14 says "Criteria for Satisfying Eleventh Circuit Test  
15 Must Be Based on Objective Standards of Economic  
16 Reasonableness and Efficiency." Do you see that?

17 A I'm sorry --

18 MR. SEIVER: I sure don't see that.

19 MR. LANGLEY: Oh. It's at page 2 of the  
20 third page of the exhibit. Sorry.

21 JUDGE SIPPEL: Page No. 2 of the third  
22 page of the exhibit. Thank you. And this is in bold

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1 print; correct?

2 MR. LANGLEY: It's in all caps, at least,  
3 Your Honor.

4 THE WITNESS: Yes.

5 BY MR. LANGLEY:

6 Q And would you please read the sentence  
7 immediately beneath that?

8 A Yes.

9 "Definition of full capacity/crowding must  
10 be based on objective benchmarks that hold the utility  
11 accountable for best practices and the efficient use  
12 augmentation of full capacity."

13 Q And so in this draft outline in March of  
14 2005, you were using the term synonymously, correct?

15 A I don't think I was using them  
16 synonymously. And again, this is a draft working  
17 outline as we discussed, as I discussed with the  
18 Judge. Both those terms are thrown out in the  
19 opinion, and so the draft is just reflecting that  
20 those terms are used out in the opinion.

21 I think on the next page, on page 3, which  
22 is you originally sent me, you know, I have the term

1 crowding in quotes, and I think that indicates -- I  
2 mean in this outline I am not really exploring, you  
3 know, what those terms from APCo mean from an economic  
4 sense. That's what I do in the analysis that I  
5 performed that is reflected in my summary of my  
6 testimony. This is an outline. It doesn't reflect  
7 the analysis. I underwent my analysis and then I  
8 reflected and made that economic distinction. This is  
9 just the words that I was going to show them that I  
10 was going to explore.

11 Q How can you write an outline for testimony  
12 before you have done your analysis?

13 MR. SEIVER: Objection, Your Honor.

14 JUDGE SIPPEL: Sustained.

15 BY MR. LANGLEY:

16 Q Ms. Kravtin, is it true that you wrote the  
17 outline for your testimony before you did your  
18 analysis?

19 MR. SEIVER: Objection, Your Honor --  
20 well, I withdraw it.

21 THE WITNESS: Possibly. You know, the  
22 outline was prepared in March of 2005, and

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1 immediately, very shortly after I was engaged. My  
2 summary, I believe, was submitted a year later in  
3 March '06, and this testimony March 31, 2006.

4 BY MR. LANGLEY:

5 Q Ms. Kravtin, in this draft, at least, you  
6 are suggesting that the standard in the outline of how  
7 the FCC case is crowded; is that right?

8 A No. Again, it's not a report. It's an  
9 outline, and I'm identifying the issues that I need to  
10 for -- that would be reflected in the analysis that I  
11 would be performing.

12 JUDGE SIPPEL: It's more a draft outline.  
13 That's how she has it, draft of outline. That's what  
14 it says.

15 BY MR. LANGLEY:

16 Q Ms. Kravtin, March of 2005 was before  
17 either side had submitted their cases in chief;  
18 correct?

19 A Are you referring to the March 31, '06  
20 testimonies?

21 Q Yes.

22 A This was done a year earlier.

1           Q       And March 2005 was before any discovery  
2 even had been taken in this case; correct?

3           MR. SEIVER: I'll object to that, Your  
4 Honor. It's beyond the representation of the record.

5           JUDGE SIPPEL: Well, I can take note of  
6 the fact that there was a lot of discovery that was  
7 done after March 2005 that there has been discovery in  
8 this case and, I don't know, it seems like the turn of  
9 the century.

10           (Laughter.)

11           JUDGE SIPPEL: So there's been a lot of  
12 information floating around.

13           BY MR. LANGLEY:

14           Q       Ms. Kravtin, you have actually reviewed  
15 most, if not all, of the discovery in this case,  
16 haven't you?

17           A       I certainly read a great deal of it.

18           Q       And you are aware that the vast majority  
19 of discovery was taken after March 2nd, 2005?

20           A       I believe that's the case.

21           Q       And, Ms. Kravtin, if you would, please, go  
22 down to the fourth bullet on page 3 of your draft

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1 outline.

2 MR. SEIVER: Page 3, or the same page?

3 MR. LANGLEY: Page 3 of the draft outline,  
4 which is page 4 of the exhibit. Your Honor, may Ms.  
5 Kravtin and I have a moment? We seem to have a  
6 document scenario.

7 JUDGE SIPPEL: Yes. We'll go off the  
8 record for just a minute.

9 (Discussion off the record.)

10 JUDGE SIPPEL: We are back on the record.

11 BY MR. LANGLEY:

12 Q Ms. Kravtin, if you would, please, on the  
13 fourth page of Exhibit 73, which is numbered page 3 in  
14 your March 2005 draft outline, would you turn your  
15 attention to the fourth bullet point.

16 JUDGE SIPPEL: Fourth bullet starts off  
17 "For many reasons"?

18 MR. LANGLEY: Yes, sir.

19 BY MR. LANGLEY:

20 Q And, Ms. Kravtin, would you please read  
21 the last sentence of that bullet point.

22 A "For many reasons the electric utility can

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1       insist on its position as monopoly owner of an  
2       essential facility, will prefer to charge higher rates  
3       and restrict uses of its poles. In the context of the  
4       Eleventh Circuit test, electric utilities are  
5       attempting to do so by asserting and are artificially  
6       creating conditions of crowding. The utilities have  
7       not presented credible evidence to support the  
8       crowding claims."

9               Q       So in March of 2005, you had already  
10       determined that the utilities have not presented  
11       credible evidence to support their crowding claims?

12              A       No, this is again a structure of an  
13       outline where based on my review of the evidence in  
14       the case, I would then develop that as part of the  
15       outline. If it was so, I mean based on the review of  
16       the facts and evidence in this case.

17              Q       Ms. Kravtin, do you agree that increased  
18       pole capacity equals reduced crowding?

19              A       Could you repeat that, please.

20              Q       Do you agree that increased pole capacity  
21       equals reduced crowding?

22              A       It certainly can. And I think it would

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1 depend on the specifics regarding the poles and  
2 working out some of the diagrams and violations and  
3 other things on the poles. I think you could increase  
4 space and still have crowding problems if there were  
5 issues with the poles that have not been addressed.

6 Q Ms. Kravtin, sometime after you first sent  
7 this draft outline to counsel for complainants, you  
8 quit using the term crowding in connection with the  
9 Alabama Power v. FCC burden. Is that correct?

10 A Well, certainly as my analysis progressed  
11 and refined, I focused on -- looking again at the  
12 scheduling order and all of the other documents, I  
13 focused specifically on what we defined -- what I  
14 defined and looked at to be the criteria for which  
15 Gulf's evidence in this case would be judged.

16 Q And after March of 2005, for whatever  
17 reasons, you determined that that criteria was full  
18 capacity, not crowded?

19 A That is correct, based on the language  
20 that I had reviewed in the Alabama Power decision, and  
21 in the various scheduling and other procedural orders  
22 in this case.

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1           Q       And that's a decision that you reached on  
2 your own?

3           A       The economic reasoning behind those  
4 distinctions was certainly something I reached on my  
5 own.

6                   MR. LANGLEY: Your Honor, may I approach  
7 the witness?

8                   JUDGE SIPPEL: Do you have another  
9 document?

10                  MR. LANGLEY: Yes, sir.

11                  JUDGE SIPPEL: Show it to Mr. Seiver  
12 first.

13                  BY MR. LANGLEY:

14           Q       Ms. Kravtin, I have handed you what has  
15 been marked for identification as Gulf Power Exhibit  
16 74. This is a memo you have seen, isn't it?

17                  JUDGE SIPPEL: Did you turn this over in  
18 discovery, Mr. Seiver?

19                  MR. SEIVER: I did, Your Honor, and so the  
20 record is clear, it might be misleading to Ms. Kravtin  
21 -- this is a memo to me from Brian Joseph. In a  
22 subsequent e-mail -- and I don't have it in front of

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1 me -- on a subsequent date I did share this with both  
2 Ms. Kravtin and Mr. Harrelson. So the record is  
3 clear, on March 9th, it was not something that was not  
4 provided to her, I don't recall, except by looking at  
5 the other e-mails when it was.

6 JUDGE SIPPEL: And who is Mr. Joseph?

7 MR. SEIVER: He is a former associate of  
8 my law firm.

9 JUDGE SIPPEL: Thank you.

10 BY MR. LANGLEY:

11 Q Ms. Kravtin, do you recall receiving this  
12 memo?

13 A I can't recall specifically. I certainly  
14 received a number of e-mail correspondence from Mr.  
15 Seiver, and certainly he has represented that it was  
16 sent to me, so I have every reason to believe that I  
17 did -- I did see it. And certainly there were  
18 discussions concerning the draft outline.

19 Q Under the section on Exhibit 74 which says  
20 "references to the term crowding," will you please  
21 read the first three sentences?

22 A "As a preliminary minor issue, I suggest

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1 that we limit our use of the term crowding or crowded  
2 when describing capacity on poles. While the APCo v.  
3 FCC court mentioned crowding in passing, it made clear  
4 that its test was full capacity."

5 Do you want me to continue?

6 Q Please read the next sentence.

7 A "To the extent possible, we want to  
8 consistently refer to full poles to emphasize Gulf  
9 Power's burden.

10 Q And, Ms. Kravtin, it was after you  
11 received this memo that you quit using the term  
12 crowding to describe the burden in APCo v. FCC?

13 MR. SEIVER: Objection, Your Honor.

14 MR. LANGLEY: Your Honor --

15 JUDGE SIPPEL: What is the objection?

16 MR. SEIVER: It's a complete  
17 misconnection, and I have explained that -- when this  
18 was sent, and I don't believe that the witness has  
19 tied in that the receipt of this memo had anything to  
20 do with whether she did or did not use a term. We  
21 haven't seen any other documents with or without that  
22 term, and she has already explained that using the

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1 term in this was counterbalanced by her using the term  
2 full capacity as well.

3 So to suggest that somehow or other a memo  
4 that she got at some point later in time made her  
5 change something that was significant is misleading.

6 JUDGE SIPPEL: Well, all right, I'm going  
7 to sustain the objection as to form, but certainly you  
8 can ask her in terms of for what purpose did she use  
9 the information from Mr. Joseph in connection with her  
10 preparing either an outline and/or report and/or  
11 testimony.

12 MR. LANGLEY: Well, Your Honor, I believe  
13 I should be entitled to ask her to first establish the  
14 timeline here. Because even if the witness, who is a  
15 professional witness, is not willing to concede that  
16 this was the reason for her change, we are certainly  
17 entitled to argue that inference.

18 JUDGE SIPPEL: Well, I'm not going to let  
19 you get away with calling her a professional witness.  
20 Keep away from that.

21 The question is what? When did she see  
22 the document? Is that what you want to know?

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1 MR. LANGLEY: Your Honor, I think I  
2 already asked her that. I'll ask her that.

3 BY MR. LANGLEY:

4 Q Ms. Kravtin, have you seen the document  
5 marked as Gulf Power Exhibit 74?

6 A As I indicated, I believe I had seen this  
7 and Mr. Seiver indicated it had been sent to me. I  
8 can't recall the exact date that I saw it.

9 Q You received it shortly after you sent  
10 your first draft outline, though, didn't you?

11 A That's what I can't really recall. I  
12 can't recall the dates.

13 Q Well, would it refresh your recollection  
14 to look at the cover e-mail on the draft outline we  
15 were discussing earlier?

16 MR. SEIVER: Objection, Your Honor.  
17 That's not an e-mail to her. And Mr. Langley has the  
18 document that I sent him that I sent to her and the  
19 people that produced that, that would be more accurate  
20 than to try to mislead anybody.

21 MR. LANGLEY: Your Honor, I'm talking  
22 right now about the e-mail that Ms. Kravtin sent to

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1 Mr. Seiver --

2 MR. SEIVER: I'm sorry. Oh. I'm sorry.  
3 I thought you were talking about 74.

4 JUDGE SIPPEL: Let's go. If that's an  
5 objection, it's overruled. Anyway, go ahead, Mr.  
6 Langley. You've got the two dates, right? You're  
7 setting up these two dates? March 2 and March 9 of  
8 2005?

9 MR. LANGLEY: Yes, Your Honor.

10 JUDGE SIPPEL: Go ahead.

11 MR. LANGLEY: Your Honor, may I approach  
12 the witness?

13 JUDGE SIPPEL: You may.

14 MR. LANGLEY: With the e-mail that Mr.  
15 Seiver was referring to?

16 JUDGE SIPPEL: You may. This has been  
17 marked for identification for identification as Gulf  
18 Power Exhibit 75.

19 (Gulf Power Exhibit 75  
20 marked for identification.)

21 BY MR. LANGLEY:

22 Q Ms. Kravtin, does this e-mail marked as

1 Gulf Power Exhibit 75 refresh your recollection about  
2 when you received the e-mail from counsel for  
3 complainants suggesting that you limit your use of the  
4 term crowded?

5 A It indicates that I was sent a copy of the  
6 e-mail to Mickey Harrelson containing my report and e-  
7 mails. It indicates that was sent on Wednesday, March  
8 9th. I disagree that I -- that the e-mail from Mr.  
9 Joseph to John Seiver directed me as to what I would  
10 do in terms of my report and my analysis.

11 Q Ms. Kravtin, is it your testimony here  
12 today that the memo had nothing to do with your change  
13 in the description of the burden?

14 MR. SEIVER: Objection. I'm not sure if  
15 there was a change in the description of the burden.

16 MR. LANGLEY: She has testified here today  
17 that the standard was full capacity, not crowded. She  
18 just testified to Your Honor for 10 minutes about  
19 that.

20 JUDGE SIPPEL: Well, let me just say  
21 you're drawing conclusions from her testimony. You  
22 know, you've got to rephrase that question. You can't

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1 put it in the context of the word change, unless you  
2 want to ask her did she change her view or change her  
3 testimony -- if you want to ask her that.

4 MR. LANGLEY: Well, Your Honor, I prefer  
5 to put it in a leading form. This is cross-  
6 examination.

7 JUDGE SIPPEL: Well, I don't know where  
8 that accomplishes anything. You are arguing, you are  
9 being argumentative with this witness on the context  
10 of her testimony. I don't want to get into any  
11 further discussion on it, so I don't want to get  
12 involved in suggesting any answers myself. But you've  
13 got to ask this -- you have to give the witness a  
14 chance. She's not going to -- well, can you answer  
15 that question?

16 THE WITNESS: Well, I can. I think I did  
17 earlier in my discussion with you, that as to the  
18 semantic words of crowding versus full capacity and  
19 the fact that are both are found in the Court decision  
20 doesn't and didn't affect my economic reasoning, the  
21 economic analysis of what full capacity means.  
22 Whether you want to call it crowding or full capacity,

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1 as I did the economic analysis and understood that  
2 there actually was an economic distinction, and that  
3 that's what really needs to be focused on, is the term  
4 full capacity is referring to the full of rivalrous,  
5 and crowding does not. Even though the terms are  
6 thrown around by the Court in various proceedings, by  
7 you as well, I think, in various decisions.

8 But I was trying in my report to focus on  
9 the economics as to whether there actually was a  
10 distinction between the two. But I believe the  
11 evidentiary burden for Gulf Power in terms of  
12 demonstrating a rivalrous condition on the pole would  
13 be true whether we call it crowding or full capacity.  
14 And I really didn't interpret this comment to an  
15 economic comment, nor in the terms of semantics as to  
16 the words. But I believe I developed in my testimony  
17 that there actually is an economic distinction.

18 But my thinking on the economics was not  
19 altered. I think that perhaps if you want to focus me  
20 to look more at -- again, I had just been engaged --  
21 at what the test meant in terms of full capacity and  
22 rivalrous economic concepts.

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1 JUDGE SIPPEL: Which memo are you talking  
2 about?

3 THE WITNESS: The memo that he has in  
4 front of me, that we are discussing from -- they are  
5 all dealing with this issue from Mr. Joseph.

6 JUDGE SIPPEL: Yes, but which one? You  
7 say the memo. Is it 73, 74?

8 THE WITNESS: : 73 is my working draft  
9 outline.

10 JUDGE SIPPEL: Right. So 74, Exhibit 74?

11 THE WITNESS: I mean that as my working  
12 draft outline, not as a memo. The memo is 74, is the  
13 memo from Mr. Joseph to John Seiver.

14 JUDGE SIPPEL: All right. Now where are  
15 we finding a change, Mr. Langley?

16 MR. LANGLEY: Your Honor, I think I can  
17 end this line of inquiry with one more question.

18 JUDGE SIPPEL: Go ahead.

19 BY MR. LANGLEY:

20 Q Ms. Kravtin, after March 9, 2005, in any  
21 of your submissions to the Court, did you describe the  
22 burden in the APCo v. FCC test as crowded?

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1           A       No. I referred to the burden in terms of  
2       the language in the APCo decision referring to full  
3       capacity and the condition of rivalrous on the poles.

4               MR. LANGLEY: Your Honor, this is a good  
5       stopping point for me, if it is for the Court.

6               JUDGE SIPPEL: All right. We'll pick up  
7       tomorrow morning. Do you have any idea how long  
8       you'll go tomorrow morning? Give or take.

9               MR. LANGLEY: I have just 22 pages left on  
10      my outline.

11              (Laughter.)

12              JUDGE SIPPEL: Maybe you can cut back  
13      tonight.

14              MR. LANGLEY: Your Honor, I think I have  
15      less than an hour.

16              JUDGE SIPPEL: That's about right for 22  
17      pages, I guess. You are excused for the evening.  
18      Don't discuss your testimony with your counsel,  
19      please. And we're going to recess until -- it's 4:30  
20      now -- until 9 o'clock tomorrow morning. Thank you.

21              (Whereupon, at 4:25 p.m., the hearing adjourned,  
22      to reconvene at 9 a.m., Thursday, April 27, 2006.)

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Name of Hearing

EB DOCKET NO. 04-381

\_\_\_\_\_  
Docket No. (if applicable)

445 12<sup>th</sup> STREET, S.W., WASHINGTON, D.C.

\_\_\_\_\_  
Place of Hearing

APRIL 26, 2006

\_\_\_\_\_  
Date of Hearing

We, the undersigned, do hereby certify that the foregoing pages, numbers 1191 through 1484, inclusive, are the true, accurate and complete transcript prepared from the reporting by \_\_\_\_\_ Charles Morrison \_\_\_\_\_ (Reporter's Name) in attendance at the above identified hearing, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription statement of Work and have verified the accuracy of the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing or conference.

May 5, 2006

Charles Morrison



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